Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

No. 97-719

In The

Supreme Court of the United States

October Term, 1997

GEORGE STUART, Secretary, as Head of the Florida Department of Business and Professional Regulation, and John P. Baumann, Jr., Charles H. Calhoun, Shaun M. Davis, Malcolm R. Duggan, Mirtha V. Martin, Francisco J. Paredes, Andrea A. Spottswood, David MacNamara, and Zoya W. Phillips, in their official capacities as Members of the Florida Board of Accountancy,

Petitioners,

vs.

AMERICAN EXPRESS TAX AND BUSINESS SERVICES, INC., a Delaware Corporation, and STEPHEN M. MILLER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY IN SUPPORT OF THE PETITIONERS

NOEL L. ALLEN
Counsel of Record
ALLEN AND PINNIX, P.A.
Attorneys for Amicus Curiae National Association of State Boards of Accountancy
20 Market Plaza
Suite 200
P.O. Drawer 1270
Raleigh, North Carolina 27602
(919) 755-0505

72650 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Whether the State of Florida's regulation of nonexpressive conduct governing the practice of public accounting is required to meet First Amendment standards simply because Florida defines the practice of public accounting as "holding out" that a person has a state license as a "CPA" when performing certain accounting services?

2. Whether the State of Florida can condition a state licensee's use of a state-created title, "CPA", on compliance with the statutes and rules governing nonexpressive conduct in the practice of public accounting without implicating or violating the First Amendment?

3. Whether "holding out" that an individual has a state license to practice public accounting ("CPA"), and providing certain public accounting services while intentionally violating the state's regulatory requirements governing the practice of public accounting is false and misleading?

4. Whether, if the First Amendment is implicated, the State of Florida regulatory scheme for the practice of public accounting is narrowly tailored and meets the *Central Hudson* test?

LIST OF PARTIES

The following parties were plaintiffs below and are the Respondents before this Court:

AMERICAN EXPRESS TAX AND BUSINESS SERVICES, INC., a Delaware Corporation and STEPHEN M. MILLER.

The following parties were defendants below and are the Petitioners before this Court:

GEORGE STUART, Secretary, as Head of the Florida Department of Business and Professional Regulation and JOHN P. BAUMANN, JR., CHARLES H. CALHOUN, SHAUN M. DAVIS, MALCOLM R. DUGGAN, MIRTHA V. MARTIN, FRANCISCO J. PAREDES, ANDREA A. SPOTTSWOOD, DAVID MACNAMARA and ZOYA W. PHILLIPS, in their official capacities of the Florida Board of Accountancy.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Interest of *Amicus Curiae*	1
Reasons for Granting the Writ	2
I. The Eleventh Circuit's Opinion May Undermine Other States' Efforts To Enforce Public Protection Laws Over Individual Licensees' And Unlicensed Businesses Who Trade Upon The CPA Title While Offering Professional Services.	2
II. The Decision Below Undermines A State's Legitimate Authority To Define And Regulate Professional Practice.	7
III. The Underlying Issue Of Concern To All State Occupational Licensing Boards Is Whether A State May Include In Its Definition Of Professional Practice The Offer To Provide Professional Services As A Licensee And Whether A State Can Prescriptively Forbid The Offering Of Those Services Through Certain Business Forms.	8

Contents

Page

IV. An Unlicensed Corporation Trading Upon The CPA Title When Offering Services To The Public Is Not Engaging In A Non-Deceptive, Lawful Activity. 12

V. Florida's Restriction Is In Reasonable Proportion To The Interest Served. 15

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Arkansas State Bd. of Architects v. Bank Bldg. & Equip. Corp., 225 Ark. 889, 286 S.W. 2d 323 (1956) 13

Case v. Ranney, 174 Mich. 673, 140 N.W. 943 (1913) 14

Central Hudson Gas Co. v. Public Serv. Co. of N.Y., 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) .....i, 12, 13

Colorado State Bd. of Accountancy v. McDonough, No. 94CA1621 (Colo. App. Mar. 7, 1996) 5

Dent v. West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889) 7

Douglas v. Noble, 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590 (1923) 7, 8

Contents

	Page
Earles v. State Board of Certified Public Accountant Examiners of Louisiana, 665 So. 2d 1288 (La. Ct. App. 1995), *cert. denied*, 669 So. 2d 397 (La. 1996)	4
Gilman v. Philadelphia, 70 U.S. 713, 3 Wall 713, 18 L. Ed. 96 (1866)	16
Ibanez v. Florida Dept. of Business & Professional Regulation, Board of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994)	2, 3, 6, 12, 15
Johnson v. California Board of Accountancy, 72 F. 3d 1427 (9th Cir. 1995).	6, 7
Lehmann v. State Bd. of Public Accountancy, 263 U.S. 394, 44 S. Ct. 128, 68 L. Ed. 354 (1923)	8
Love v. Waukesha Joint School Dist., 560 F.2d 285 (7th Cir. 1977)	16
Miller v. Stuart, 117 F.3d 1376 (11th Cir. 1997)	3, 15
People v. Beakes Dairy Co., 222 N.Y. 416, 119 N.E. 115, 118 (1918)	13
Sinnot v. Davenport, 63 U.S. 227, 22 How. 227, 16 L. Ed. 243 (1859)	16
Texas State Bd. of Public Accountancy v. American Express Tax & Business Servs., Inc., No. 95-07496 (D. Ct. Travis Co. April 23, 1996)	5

Contents

Page

Virginia Pharmacy Bd. v. Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) .. 12

Statutes Cited:

Alabama [Ala. Admin. Code r. 30-X-6-05(6) (1996)] . 8

Alabama [Ala. Code § 34-1-6 (1975)] 10

Alaska [Alaska Stat. § 08.04.240(b) (1996)] 10

Arizona [Ariz. Admin. Code R-4-1-55.03(D) (1996)] . 8

Arizona [Ariz. Rev. Stat. Ann. § 32-734 (1996)] 10

Arkansas [Ark. Code 17-12-401(b) (1987, 1995 ed.)] . 10

California [Cal. Bus. & Prof. Code § 5150 (West 1990)] 10

Colorado [Colo. Rev. Stat. § 12-2-117(1) (1997)] 10

Connecticut [Conn. Agencies Regs. § 20-280-15c(o) (1992)] 8

Connecticut [Conn. Gen. Stat. § 20-281(a) (1958 & West Supp. 1997)] 10

Delaware [adopted AICPA Code Prof. Conduct Rule 505 (1992)] 8, 9

Contents

	Page
Delaware [Del. Code Ann. tit. 24, § 112(a) (1997)] ...	10
District of Columbia [D.C. Code Ann. § 2-111 (1981 & Michie Supp. 1997)]	10
District of Columbia [D.C. Mun. Regs. tit. 17, § 2513(5) (1987)]	8
Florida [Fla. Stat. § 473.309 (1991 & Supp. 1998)] ...	8
Florida [Fla. Stat. § 473.3101(1991 & West Supp. 1998)]	10
Georgia [Ga. Code Ann. § 43-3-21 (1994 & Michie Supp. 1997)]	10
Georgia [Ga. Comp. R. & Regs. r. 20-12-16 (1997)] ..	8
Haw. Admin. R. tit. 16, § 16-71-8(a) (1995)	9
Haw. Admin. R. tit. 16, § 16-71-9(b) (1995)	9
Hawaii [Haw. Rev. Stat. § 466-7(d) (1993)]	10
Idaho [Idaho Code § 54-214(1) (1947, 1994 ed.)]	10
Idaho [Reg. Idaho Bd. Acct., Rule 414 (1993)]	8
Illinois [Ill. Comp. Stat. ch. 225, para. 459/14 (1994)]	10

Contents

Page

Illinois [Ill. Admin. Code tit. 68, § 1430.5050(a) (1995)] 8

Indiana [Ind. Code § 25-2.1-5-1 (1988)] 10

Iowa [Iowa Admin. Code r. 193A-11.6-542C(5) (1997)] 8, 9

Iowa [Iowa Code § 542C.18 (1997)] 10

Kansas [Kan. Stat. Ann. § 1-308 (1991 & Supp. 1996)] 10

Kentucky [201 Ky. Admin. Reg. 1:300 § 11(2) (1995)] 10

Louisiana [La. Admin. Code tit. 46, § 507(F) (1986)] . 9, 10

Maine [Me. Rev. Stat. Ann. tit. 32 § 12252 (1964, 1988 rev.)] 10

Maryland [Md. Regs. Code tit. 09, § 24.01.06(I)(3) (1996) 9

Maryland [Md. Ann. Code § 2-401(a) (1995)] 10

Massachusetts [Mass. Gen. Laws Ann., ch. 112, § 87B 1/2(h) (1996 & West Supp. 1997)] 10

Massachusetts [Mass. Regs. Code tit. 252, § 3.05(5)(a) (1989) 9

Contents

	Page
Michigan [Mich. Comp. Laws § 339.705(c) (1992)] ..	10
Minn. R. 1100.2500 (1996)	10
Minn. R. 1100.2500(10)(A) (1996)	10
Minnesota [Minn. Stat. § 326.20 (1995)]	10
Mississippi [R. Miss. St. Bd. Acct., Rule VI(A)(2)(p) (1996)]	9, 10
Missouri [Mo. Code Regs. tit. 4, § 10-2.051 (1997)] ..	10
Montana [Mont. Code Ann. § 37-50-332 (1997)]	10
N.C. Gen. Stat. § 55B-14 (1996)	14
Nebraska [R. Neb. St. Bd. Pub. Acct. ch. 11.002 (1995)]	9, 10
Nevada [Nev. Rev. Stat. § 628.325 (1996)]	10
Nevada [R. Nev. St. Bd. Acct., Rule 628.500 (1996), adopting AICPA Code Prof. Conduct Rule 505 (1992)]	9
New Hampshire [N.H. Code Admin. R. AC507.05(a) (1990)]	9, 11
New Jersey [N.J. Admin. Code tit. 13, § 29-3.14 (1985)]	9, 11

Contents

Page

New Mexico [Reg. N.M. St. Bd. Pub. Acct., Rule 8.4.5 (1995)] 9

New Mexico [N.M. Stat. Ann. § 61-28A-15 (1978, 1993 ed. & Supp. 1997)] 11

New York [N.Y. Comp. Codes R. & Regs. tit. 8, § 59.10 (1995)] 11

North Carolina [N.C. Admin. Code tit. 21, r. 8A.0104 (1987)] 11

North Carolina [N.C. Admin. Code tit. 21, r. 8A.0302(a) (1987)] 9

North Dakota [N.D. Cent. Code § 43-02.2-06 (1993)] . 11

Ohio [Ohio Admin. Code § 4701-11-05(A) (1997)] ... 9

Ohio [Ohio Admin. Code § 4701-13-02 (1996)] 11

Oklahoma [Okla. Stat. Ann.tit. 59, § 15.15A (1989 & West Supp. 1998)] 11

Oklahoma [R. Okla. St. Bd. Acct. § 15-3-1 (1995)] ... 9

Oregon [Or. Admin. R. 801-10-340 (1997)] 11

Pennsylvania [49 Pa. Code § 11.35 (1996)] 9

Pennsylvania [63 Pa. Cons. Stat. Ann. § 9.8f (Purdon 1996)] 11

Contents

	Page
Reg. Ark. St. Bd. Acct. Rule 15.1 (1989)	9
Reg. Ark. St. Bd. Acct. Rule 405 (1989)	9
Rhode Island [R.I. Gen. Laws § 5-3.1-9 (1956, 1995 ed.)]	11
Rhode Island [R. R.I. Bd. Acct., art. 4, § 4.5 (1984)]	9
South Carolina [S.C. Code Regs. 1-33(E) (1988)]	9, 11
South Dakota [Admin. Code S.D. § 20:37:11:15 (1986)]	9, 11
Texas [Tex. Admin. Code ch. 501, § 513.41 (1994)]	11
Texas [Texas Admin. Code § 501.46 (1997)]	9
Tennessee [Tenn. Code Ann. § 62-1-113 (1997)]	11
Utah [Utah Code Ann. §§ 58-26-2(8) & 58-26-14 (1989, 1996 ed.)]	11
Vermont [R. Vt. Bd. Pub. Acct., Rule 10.17 (1997)]	9
Vermont [Vt. Stat. Ann. tit. 26, § 73 (1989 & Michie Supp. 1997)]	11
Virginia [Va. Code Ann. § 54.1-2005 (1950, 1994 ed.)]	11

Contents

Page

Washington [Wash. Admin. Code § 4-25-750 (1996)] 9, 11

West Virginia [W.V. Code St. R. § 1-1-10.1 (1996)] ... 11

West Virginia [W.V. Code St. R. § 1-1-11.5(d) (1996)] 9

Wisconsin [Wis. Admin. Code § Accy 1.405(1) (1995)] 9

Wisconsin [Wis. Admin. Code § Accy 4.02 (1995)] ... 11

Wyoming [Wyo. Bd. Cert. Pub. Accts., R. & Regs., Rule 405 (1996)] 9

Wyoming [Wyo. Stat. § 33-3-118 (1997)] 11

United States Constitution Cited:

First Amendment ..... i, 12

Tenth Amendment 16

Fourteenth Amendment 16

Rule Cited:

Supreme Court Rule 37 1

Other Authority Cited:

Shapiro, *AmEx and the Texas Accountancy Board Both Claim to Be the Winners. Who Are the Losers?*; Nat'l Pub. Acct., July, 1997, at 6 3

INTEREST OF *AMICUS CURIAE*

Established ninety years ago, the National Association of State Boards of Accountancy ("NASBA") is the national association comprised of each of the statutorily created boards of accountancy.[1] As explained in its Bylaws, NASBA protects, promotes, fosters and advances the "common interests and welfare of boards of accountancy of the various states of the United States, its territories and the District of Columbia, including providing a forum for the exchange of information and obtaining assistance in discharging such boards' responsibilities for the administration of public accountancy laws and for the protection of the public interest as it is affected by the practice of public accountancy. . . ."

Reflecting the public purpose of its member boards, through its officers and committees, NASBA develops and promotes the Uniform Accountancy Act ("UAA"), provides examination services to states, advances interstate reciprocity, adopts resolutions on public protection issues and provides board member training on enforcement and admissions issues. NASBA represents its member boards in the implementation of agreements and treaties that provide for international reciprocity. NASBA also maintains a national continuing professional education registry and has established a multi-state disciplinary information database.

An important part of NASBA's assistance includes litigation support of state boards as *amicus* in cases involving public protection issues of common concern. Since every jurisdiction's accountancy board is authorized by statute to directly regulate the professional services rendered by Certified Public Accountants

---

1. NASBA hereby respectfully submits this brief as an *amicus curiae* in support of the Petition for Writ of Certiorari in accordance with Rule 37 of the Supreme Court Rules. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae* have made a monetary contribution to the preparation or submission of the brief. All parties have consented to this filing, and their written consents are filed with this brief.

("CPAs"), NASBA is vitally concerned with any decision that directly undermines a board's ability to protect the public.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S OPINION MAY UNDERMINE OTHER STATES' EFFORTS TO ENFORCE PUBLIC PROTECTION LAWS OVER INDIVIDUAL LICENSEES AND UNLICENSED BUSINESSES WHO TRADE UPON THE CPA TITLE WHILE OFFERING PROFESSIONAL SERVICES.

The *Ibanez*[2] decision, based upon a "bare record," held that CPAs in a commercial vacuum may use their CPA titles so long as they are not deceptive.[3] However, in the aftermath of that decision it was not clear how a CPA who trades upon the CPA title when employed by an unlicensed business entity might prepare financial statements for the public and still comply with regulations governing professional services.

The regulation of accountancy is at a critical juncture. There is a great need for Supreme Court clarity on pivotal issues. NASBA and the American Institute of Certified Public Accountants ("AICPA") have developed a joint proposal to overhaul accountancy laws and regulations through the UAA. Changes to be addressed by the UAA include CPA firm ownership, removal of barriers to interstate practice, and use of the CPA title. The revised uniform act will be introduced in state legislatures next year, fostering critical reforms for the regulation of accountancy in the context of a global economy and electronic commerce. Despite substantial proposed reforms, the bedrock of the new UAA will be public protection through preservation of individual competence, accountability and objectivity of licensees who render

---

2. *Ibanez v. Florida Dept. of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

3. *Id.* at 148-49, 114 S. Ct. at 2091-92.

professional services to the public. Impetus to move forward with the proposal is due, in part, to the confusion based on the questions left by *Ibanez*, as well as the Eleventh Circuit's *Miller* decision. Both the accounting practitioners and the public are unclear as to what effect the decision will have on regulators, the accounting profession and the clients it serves.[4]

The Eleventh Circuit's opinion, though it professes to be limited to its unique facts, casts a shadow upon other states' efforts to enforce their public protection laws over licensees' conduct regarding professional services. Specifically, the Eleventh Circuit's opinion in this case contrives a new Achilles' heel in the ability of the states to protect their citizens. In almost all states, these "attest services" have been reserved by law to CPAs. Other related professional services, such as the compilation of financial statements for small businesses, might be lawfully performed by non-licensees in many states; however, because such financial statements, when prepared and signed by a CPA using the CPA title, inevitably engender public reliance, these services must still comply with applicable standards and must be rendered by licensees through a business form that assures not only competence, but also independence and objectivity.

Unlike any other professional title, credential or specialty designation, the regulation of the CPA title, itself, is imbued with far more than a mere representation of education, examination and experience. The title itself incorporates the word "public." Licensees are not merely certified as accountants. They are licensed by the states as qualified to engage in "public" accounting. The term "public" pertains not only to the reasonable expectations of clients, but, in particular, the promotion of third-party ("public") reliance upon the assurance services provided by CPAs.

For one hundred years, state accountancy boards have fostered that aura of reliability through pro-active and prescriptive public

---

4. Shapiro, *AmEx and the Texas Accountancy Board Both Claim to Be the Winners. Who Are the Losers?*, Nat'l Pub. Acct., July, 1997, at 6.

protection. The *public* in the title "certified public accountant" includes not only state and federal securities, banking and insurance regulators, but also private investors and lenders who reasonably trust not only the CPAs' audits and reports on financial statements, but also their compilations and other assurance services. Many in this latter category may not be parties in "privity" and might not have private civil recourse against the CPAs providing those services. Nevertheless, the ability of the third-party public to rely upon the un-subordinated professional judgement of certified *public* accountants is an essential ingredient to a vibrant economy. Yet, only the state accountancy boards protect the "public" who may have no private action for damages. The use of the CPA title by licensees such as Miller, not only allows his unlicensed general business corporate employer to trade upon his licensure, but also undermines a century of state encouragement of public reliance upon the professional work of CPAs in a broader range of attest and assurance services than is currently reserved in Florida for only the CPAs.

There are many examples of state enforcement that are beyond mere "speculation and conjecture" and that corroborate Florida's need for proscriptive public protection. In *Earles v. State Board of Certified Public Accountant Examiners of Louisiana*.[5] A Louisiana CPA, concurrently engaged in the practice of public accounting and providing securities brokerage services to the same clients, appealed a Board decision that he violated the rule on incompatible occupations and which conditioned his continued licensure on the condition that he cease such activity. The district court reversed the Board's decision without written reason; the Board subsequently appealed to the Louisiana Court of Appeals, seeking to have the lower court's finding overturned. The court of appeals upheld the Board's earlier decision, holding in part that: (1) The CPA did represent some of the same clients as both a CPA and a commission-based securities broker; (2) The professional objectivity of a CPA

5. 665 So. 2d 1288 (La. Ct. App. 1995), *cert. denied*, 669 So. 2d 397 (La. 1996). This state court decision is cited not as authority, but as an example.

could clearly be at risk, or appear to be at risk, not only when providing attest services, but also for other services performed for the client (such as tax investment advisory services) when he stands to receive a commission for the sale of securities to that same client; and (3) A rational analysis could lead the Board to conclude that Earles was violating the incompatible occupations rule.

Similarly, in *Colorado v. McDonough*[6] a state ban on a CPA's practice in an unregister firm was upheld. A Colorado CPA and his firm appealed from an order of the Colorado Board which required them to cease and desist from engaging in false, misleading or deceptive advertising, making misrepresentations concerning the scope of professional services offered by the firm, and misrepresenting the existence of an accountant referral service when their firm was the only member of that service, and from the imposition of a $1,000 civil penalty for failing to register their professional corporation for eight years. The Colorado Court of Appeals upheld the Board order, holding that the record contained sufficient evidence to show that the firm's Yellow Pages advertising was misleading, in that respondents offered to perform services which, by law, they could not, thereby violating a Board rule.

In a case involving similar parties, and comparable public protection concerns, a state court upheld a ban on use of the CPA title on financial statements by an unregistered Firm."[7] The Texas

---

6. *Colorado State Bd. of Accountancy v. McDonough*, No. 94CA1621 (Colo. App. Mar. 7, 1996). This unpublished decision is not offered as authority, but as an example regarding the implications of the circuit court's decision.

7. *Texas State Bd. of Public Accountancy v. American Express Tax & Business Servs., Inc.*, No. 95-07496 (D. Ct. Travis Co. April 23, 1996). This state court decision is cited not as authority, but as an example.

Board sought injunctive relief to prohibit American Express Tax and Business Services from issuing compiled financial statements accompanied by transmittal letters indicating the statements had been prepared with applicable professional standards for CPAs and CPA firms, representing that the non-licensed firm had expertise in accounting. The district court granted the Board's motion for summary judgment, ruling that: (1) American Express Tax and Business Services violated Texas accountancy law by issuing financial statements with the transmittal letters; and (2) American Express can issue financial statements so long as the transmittal letters do not contain the prohibited language. However, the court did not specifically address the issue regarding CPA employees of American Express who will now violate professional standards if they issue the non-professional form of the transmittal letter.

Finally, in a case from another circuit in conflict with the Eleventh Circuit decision,[8] Johnson, a CPA affiliated with H.D. Vest Investment Securities, Inc., sought a preliminary injunction against the California Board to stop it from enforcing its laws forbidding CPAs from accepting commissions. Johnson challenged the ban on grounds of constitutionally-protected free speech, contending that the lower court erroneously applied the less stringent "rational basis test" rather than the "strict scrutiny test." The Ninth Circuit affirmed the lower court's denial of an injunction against the Board despite the fact that Johnson provided a written disclaimer to clients, did not render attest services, and was a solo practitioner.[9] The Ninth Circuit decision did not apply to *Ibanez*[10]

---

8. *Johnson v. California Board of Accountancy*, 72 F. 3d 1427 (9th Cir. 1995).

9. *Id.* at 1433.

10. *Ibanez, supra*, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

because the California restriction regulated not the holding out, but the conduct Johnson engaged in while holding out.[11]

II. THE DECISION BELOW UNDERMINES A STATE'S LEGITIMATE AUTHORITY TO DEFINE AND REGULATE PROFESSIONAL PRACTICE.

It is the proper exercise of the police powers of the state to regulate the professions. In the interest of protecting the public from harm, the states enact statutes and regulations controlling various aspects of the professions, including, but not limited to, admission to practice, practice standards, competency and removal from practice. The landmark case concerning the right to regulate professional occupations, especially admission to a profession, is *Dent v. West Virginia*.[12] In *Dent*, a physician who was denied a license to practice challenged the authority of the newly-created West Virginia State Board of Health. The Court upheld the decision of the West Virginia Supreme Court of Appeals, maintaining that "[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud."[13]

The police power of the state to regulate the professions is vested in administrative agencies or boards. It is well-settled that a state legislature may delegate powers and a degree of discretion to its administrative agencies concerning the licensure of professionals. In *Douglas v. Noble*,[14] a case dealing with the practice of dentistry, the Court opined that the requisite skills, knowledge

---

11. *Johnson* at 1432.

12. 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889).

13. *Id.* at 122, 9 S. Ct. at 233.

14. 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590 (1923).

and examination procedures to determine the same were "matters appropriately committed to an administrative board . . . [a]nd a Legislature may, consistently with the federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness."[15] The Court held in another case that same year that the delegation of specified governmental powers (including the right to grant licensure as a CPA) to a state board of accountancy was beyond constitutional reproach.[16]

III. THE UNDERLYING ISSUE OF CONCERN TO ALL STATE OCCUPATIONAL LICENSING BOARDS IS WHETHER A STATE MAY INCLUDE IN ITS DEFINITION OF PROFESSIONAL PRACTICE THE OFFER TO PROVIDE PROFESSIONAL SERVICES AS A LICENSEE AND WHETHER A STATE CAN PROSCRIPTIVELY FORBID THE OFFERING OF THOSE SERVICES THROUGH CERTAIN BUSINESS FORMS.

CPAs, like attorneys, are specifically prohibited from offering professional services through general business corporations in the overwhelming majority of states and the District of Columbia.[17]

---

15. *Id.* at 170, 43 S. Ct. at 305.

16. *Lehmann v. State Bd. of Public Accountancy*, 263 U.S. 394, 397, 44 S. Ct. 128, 129, 68 L. Ed. 354, 355 (1923).

17. States expressly prohibiting CPAs from offering professional services through general business corporations include: Alabama [Ala. Admin. Code r. 30-X-6-05(6) (1996)]; Arizona [Ariz. Admin. Code R-4-1-55.03(D) (1996)]; Connecticut [Conn. Agencies Regs. § 20-280-15c(o) (1992)]; Delaware [adopted AICPA Code Prof. Conduct Rule 505 (1992)]; District of Columbia [D.C. Mun. Regs. tit. 17, § 2513(5) (1987)]; Florida [Fla. Stat. § 473.309 (1991 & Supp. 1998)]; Georgia [Ga. Comp. R. & Regs. r. 20-12-16 (1997)]; Idaho [Reg. Idaho Bd. Acct., Rule 414 (1993)]; Illinois [Ill. Admin. Code tit. 68, § 1430.5050(a) (1995)]; Iowa [Iowa Admin. Code

(Cont'd)

Three states may permit CPAs to render non-attest professional services through unlicensed firms or general business corporations, but only if certain conditions are met. In Arkansas, a CPA may render unlimited services in a corporation or other entity which is not registered with the board if an appropriate disclaimer is used.[18] Hawaiian regulation provides that CPAs "not in public practice" clearly indicate the fact by adding the words "not in public practice" to any use of their CPA designation.[19] In Minnesota, a licensee

(Cont'd)
r. 193A-11.6-542C(5) (1997)]; Louisiana [La. Admin. Code tit. 46, § 507(F) (1986)]; Maryland [Md. Regs. Code tit. 09, § 24.01.06(I)(3) (1996)]; Massachusetts [Mass. Regs. Code tit. 252, § 3.05(5)(a) (1989)]; Mississippi [R. Miss. St. Bd. Acct., Rule VI(A)(2)(p) (1996)]; Nebraska [R. Neb. St. Bd. Pub. Acct. ch. 11.002 (1995)]; Nevada [R. Nev. St. Bd. Acct., Rule 628.500 (1996), adopting AICPA Code Prof. Conduct Rule 505 (1992)]; New Hampshire [N.H. Code Admin. R. AC507.05(a) (1990)]; New Jersey [N.J. Admin. Code tit. 13, § 29-3.14 (1985)]; New Mexico [Reg. N.M. St. Bd. Pub. Acct., Rule 8.4.5 (1995)]; North Carolina [N.C. Admin. Code tit. 21, r. 8A.0302(a) (1987)]; Ohio [Ohio Admin. Code § 4701-11-05(A) (1997)]; Oklahoma [R. Okla. St. Bd. Acct. § 15-3-1 (1995)]; Pennsylvania [49 Pa. Code § 11.35 (1996)]; Rhode Island [R. R.I. Bd. Acct., art. 4, § 4.5 (1984)]; South Carolina [S.C. Code Regs. 1-33(E) (1988)]; South Dakota [Admin. Code S.D. § 20:37:11:15 (1986)]; Texas [Texas Admin. Code § 501.46 (1997)]; Vermont [R. Vt. Bd. Pub. Acct., Rule 10.17 (1997)]; Washington [Wash. Admin. Code § 4-25-750 (1996)]; West Virginia [W.V. Code St. R. § 1-1-11.5(d) (1996)]; Wisconsin [Wis. Admin. Code § Accy 1.405(1) (1995)]; Wyoming [Wyo. Bd. Cert. Pub. Accts., R. & Regs., Rule 405 (1996)].

18. Reg. Ark. St. Bd. Acct. Rule 405 (1989). The CPA shall not permit his CPA title or designation to be used by the unregistered entity on any sign, card, letterhead or in any advertisement or directory without the disclaimer that the entity is not registered with the board. Reg. Ark. St. Bd. Acct. Rule 15.1 (1989). Also, a CPA performing attest services (including services that Florida might not defene as "attest") may not allow his name to be used in association with the name of an unregistered entity. *Id.*

19. Haw. Admin. R. tit. 16, § 16-71-9(b) (1995). "Public practice" is defined in Hawaii as "performing for a client, on a fee basis, one or more types of services rendered by public accountants and holding out to the public to be a certified public accountant . . . or a public accounting firm. . . ." Haw. Admin. R. tit. 16, § 16-71-8(a) (1995).

who is an employee, shareholder, partner or member of an unlicensened firm may not engage in certain accounting practices.[20]

CPAs, like other professionals such as attorneys, may practice though a professional association or professional corporation in every state and the District of Columbia.[21] However, all of those

---

20. Minn. R. 1100.2500 (1996). Prohibited practices include "the expression of any form or assurance on financial statements or similar financial information; expressing opinions on financial statements or similar financial information for credit purposes, for use in courts, and for other purposes involving third parties; or service involving the use of auditing skills by a person or firm." *Id.* & Minn. R. 1100.2500(10)(A) (1996).

21. Those states authorizing CPAs to practice through a professional association or professional corporation include: Alabama [Ala. Code § 34-1-6 (1975)]; Alaska [Alaska Stat. § 08.04.240(b) (1996)]; Arizona [Ariz. Rev. Stat. Ann. § 32-734 (1996)]; Arkansas [Ark. Code 17-12-401(b) (1987, 1995 ed.)]; California [Cal. Bus. & Prof. Code § 5150 (West 1990)]; Colorado [Colo. Rev. Stat. § 12-2-117(1) (1997)]; Connecticut [Conn. Gen. Stat. § 20-281(a) (1958 & West Supp. 1997)]; Delaware [Del. Code Ann. tit. 24, § 112(a) (1997)]; District of Columbia [D.C. Code Ann. § 2-111 (1981 & Michie Supp. 1997)]; Florida [Fla. Stat. § 473.3101(1991 & West Supp. 1998)]; Georgia [Ga. Code Ann. § 43-3-21 (1994 & Michie Supp. 1997)]; Hawaii [Haw. Rev. Stat. § 466-7(d) (1993)]; Idaho [Idaho Code § 54-214(1) (1947, 1994 ed.)]; Illinois [Ill. Comp. Stat. ch. 225, para. 459/14 (1994)]; Indiana [Ind. Code § 25-2.1-5-1 (1988)]; Iowa [Iowa Code § 542C.18 (1997)]; Kansas [Kan. Stat. Ann. § 1-308 (1991 & Supp. 1996)]; Kentucky [201 Ky. Admin. Reg. 1:300 § 11(2) (1995)]; Louisiana [La. Admin. Code tit. 46, § 507(F) (1986)]; Maine [Me. Rev. Stat. Ann. tit. 32 § 12252 (1964, 1988 rev.)]; Maryland [Md. Ann. Code § 2-401(a) (1995)]; Massachusetts [Mass. Gen. Laws Ann., ch. 112, § 87B 1/2(h) (1996 & West Supp. 1997)]; Michigan [Mich. Comp. Laws § 339.705(c) (1992)]; Minnesota [Minn. Stat. § 326.20 (1995)]; Mississippi [R. Miss. St. Bd. Acct., Rule VI(A)(2)(p) (1996)]; Missouri [Mo. Code Regs. tit. 4, § 10-2.051 (1997)]; Montana [Mont. Code Ann. § 37-50-332 (1997)]; Nebraska [R. Neb. St. Bd. Pub. Acct. ch. 11.002 (1995)]; Nevada [Nev. Rev. Stat. § 628.325 (1996)]; (Cont'd)

states provide by law that licensees remain individually liable for their professional conduct as well as the actions of anyone working under their direction or supervision.

The public protection interests at stake are well established. First, an employee of a general business corporation (non-professional) is not personally liable for breaches of contract concerning conduct arising solely out of their status as a corporate employee. Second, an employee typically owes a fiduciary duty to the corporate employer. Thus, as a matter of law, a licensee could have to subordinate professional judgment. Other issues of confidentiality and retention of client records would be inevitable.

(Cont'd)
New Hampshire [N.H. Code Admin. R. AC507.05(a) (1990)]; New Jersey [N.J. Admin. Code tit. 13, § 29-3.14 (1985)]; New Mexico [N.M. Stat. Ann. § 61-28A-15 (1978, 1993 ed. & Supp. 1997)]; New York [N.Y. Comp. Codes R. & Regs. tit. 8, § 59.10 (1995)]; North Carolina [N.C. Admin. Code tit. 21, r. 8A.0104 (1987)]; North Dakota [N.D. Cent. Code § 43-02.2-06 (1993)]; Ohio [Ohio Admin. Code § 4701-13-02 (1996)]; Oklahoma [Okla. Stat. Ann.tit. 59, § 15.15A (1989 & West Supp. 1998)]; Oregon [Or. Admin. R. 801-10-340 (1997)]; Pennsylvania [63 Pa. Cons. Stat. Ann. § 9.8f (Purdon 1996)]; Rhode Island [R.I. Gen. Laws § 5-3.1-9 (1956, 1995 ed.)]; South Carolina [S.C. Code Regs. 1-33(E) (1988)]; South Dakota [Admin. Code S.D. § 20:37:11:15 (1986)]; Tennessee [Tenn. Code Ann. § 62-1-113 (1997)]; Texas [Tex. Admin. Code ch. 501, § 513.41 (1994)]; Utah [Utah Code Ann. §§ 58-26-2(8) & 58-26-14 (1989, 1996 ed.)]; Vermont [Vt. Stat. Ann. tit. 26, § 73 (1989 & Michie Supp. 1997)]; Virginia [Va. Code Ann. § 54.1-2005 (1950, 1994 ed.)]; Washington [Wash. Admin. Code § 4-25-750 (1996)]; West Virginia [W.V. Code St. R. § 1-1-10.1 (1996)]; Wisconsin [Wis. Admin. Code § Accy 4.02 (1995)]; Wyoming [Wyo. Stat. § 33-3-118 (1997)].

IV. AN UNLICENSED CORPORATION TRADING UPON THE CPA TITLE WHEN OFFERING SERVICES TO THE PUBLIC IS NOT ENGAGING IN A NON-DECEPTIVE, LAWFUL ACTIVITY.

"The First Amendment, as applied to the States, through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation."[22] But the Constitution provides a lesser degree of protection to commercial speech than to other constitutionally protected expressions.[23]

This Court has developed a four-part analysis for determining whether the expression is protected by the First Amendment: (1) Does the expression concern lawful activity and is it not misleading? (2) Is the asserted governmental interest substantial? (3) Does the regulation directly advance the governmental interest asserted? (4) Is the regulation more extensive than necessary to serve the governmental interest?[24]

In *Ibanez*,[25] this Court has determined that *a licensee's* use of the term "CPA" was commercial speech and that on a bare record the State agency had "not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes."[26]

---

22. *Central Hudson Gas Co. v. Public Serv. Co. of N.Y.*, 447 U.S. 557, 562, 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341 (1980), *citing Virginia Pharmacy Bd. v. Citizens Consumer Council*, 425 U.S. 748, 761-762, 96 S. Ct. 1817, 1825, 48 L. Ed. 2d 346 (1976).

23. *Id.* at 563, 100 S. Ct at 2350.

24. *See Id.* at 566, 100 S. Ct. at 2351.

25. *Ibanez, supra*, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

26. *Id.* at 139, 114 S. Ct. at 2086.

Here, the State, by defining the term "holding out," has prohibited a licensee from "holding out" while employed by a corporation. A person's status as a corporation does not include any natural right to conduct business without a license that is validly required for the conduct of such business.[27] Indeed, it is well established that a State may preclude a corporation from operating as a professional.[28] In the present case, American Express is an unlicenced person seeking to trade upon its employees' certifications in the sale of its accounting and tax services. "The government may ban forms of communication more likely to deceive the public than inform it."[29]

Unlike Ibanez, American Express cannot claim that it is a licensee. Thus, by definition, its activity is unlawful, and it seeks to invalidate this legal requirement in the name of commercial speech. The policy argument of whether a corporation may operate as a licensee is a legislative question, not a judicial question. The trial court correctly dismissed this claim. In reversing the dismissal, the Eleventh Circuit confused the issue of standing and the possibility of prosecution with the threshold question of whether the corporation may exercise a commercial speech right when it could not even be licensed. The trial court concluded that the State's interest was substantial, and the Eleventh Circuit accepted that determination without deciding it. Further, both the trial court and the Eleventh Circuit assumed without deciding that the regulation advanced the State's interest.

It is well-established that state regulatory authority and professional accountability include the commercial conduct of

---

27. *People v. Beakes Dairy Co.*, 222 N.Y. 416, 119 N.E. 115, 118 (1918).

28. This proscription applies in numerous professions, including attorneys and architects; *See Arkansas State Bd. of Architects v. Bank Bldg. & Equip. Corp.*, 225 Ark. 889, 286 S.W.2d 323 (1956).

29. *Central Hudson* at 564, 100 S. Ct. at 2350.

licensees even when they are just rendering services ancillary to the specific services that are reserved only to licensees.[30] The services Miller proposes to offer through an unlicenced general business corporation include ancillary services, as well as certain services regarding financial statements that may be categorized in other states and the proposed UAA as "attest services." In Florida, Miller and his employer could offer non-attest services so long as neither trades upon the CPA title. But, like an attorney who renders tax preparation services, when the licensee does so while using their state certification to encourage greater client reliance, that licensee has not so much exercised commercial speech as they have engaged in the practice of a profession. In that case, even though the state might choose not to limit ancillary commercial activities to licensees, the state may still restrict the form of practice of any licensee who trades upon their certification to attract business.

The relevance of the CPA title in this context is pre-determined by the licensees and their employers who believe that a state-administered title, including the word "public," will serve their private business interests. State licensing boards should not be forced to lie in wait for the inevitable case against a licensee who chooses to practice ancillary services in a commercial context in which, as a matter of law, the licensee will subordinate their judgment, charge prohibited fees, or avoid individual legal responsibility to clients and the public.

---

30. *See* for example, *Case v. Ranney*, 174 Mich. 673, 682, 140 N.W. 943, 946 (1913) (professional services by an attorney are not limited to litigation, but include giving advice, managing a business, devising plans, and making collections, even though such services may be rendered by persons other than attorneys). Statutes authorizing practice through professional corporations expressly encompass "ancillary services." *See* for example, N.C. Gen. Stat. § 55B-14 (1996).

V. FLORIDA'S RESTRICTION IS IN REASONABLE PROPORTION TO THE INTEREST SERVED.

Government certification is inherently regulated speech. The government's interest is up-front, reserved and conditioned. Indeed, implicit in the government's power to grant or deny licensure is the power to restrict the confusing use of the fact of licensure. The title itself communicates more than credentials and differs from specialty designations provided by private associations. The title is evidenced by a certificate in which many states reserve a property interest in as much as the certificate itself may be forfeited for failure to renew. The state's authority to regulate its usage is *not* encumbered by the commercial speech doctrine; it is *sine qua non* restricted speech. One applies for the title and accepts it subject to those restrictions. This is not a bald restriction on the communication of independent market information.

The trial court and the Eleventh Circuit concluded that, as to Miller, the restriction exceeded reasonableness because it ". . . completely prevent[ed] Miller from holding himself out as a CPA. . . ."[31] This conclusion is incorrect. Miller could hold himself out as a CPA separate and apart from his work at American Express. He was not required to work for a corporation. Moreover, the mere fact that he chose to work for a general business corporation does not give him the inherent right to operate as a professional within that corporation. Having agreed to be licensed, he agreed to abide by the rules and regulations of the licensing board. Miller, unlike Ibanez, is not otherwise employed as a licensee in a form of business comparable to those allowed for CPAs.[32]

---

31. *Miller v. Stuart*, 117 F.3d 1376, 1384 (11th Cir. 1997).

32. "Ibanez, it bears emphasis, [was] engaged in the practice of law and so represent[ed] her offices to the public. Indeed, she perform[ed] work reserved for lawyers, but nothing that *only* CPAs may do." *Ibanez* at 148, 114 S. Ct. at 2091. Although she was not in a CPA firm, she was in a business entity through which attorneys could practice.

Similarly, the fact that American Express seeks to compete in the field of accountancy by advertising its employment of CPAs should not become a basis for invalidating the statutory scheme that precludes the licensure of general business corporations. Indeed, the Tenth Amendment reserves to the states the prerogative to prevent such persons from being licensed. This Court, in applying the Tenth Amendment, has held that State police power has not been surrendered to general government, but is reserved to the states.[33] Until the dormant power of the Constitution is awakened and made effective, the reserved power of the state is plenary, and its exercise in good faith cannot be made subject to review.[34] Clearly, the power reserved to the States by the Tenth Amendment is subject to a reasonable balancing with other amendments; *see Love v. Waukesha Joint School Dist.*,[35] where the Seventh Circuit concluded that the Fourteenth Amendment limited the Tenth Amendment so as to allow application of the Civil Rights Act of 1964. But here, if the Court were to hold that American Express were allowed to use or assume the CPA title by advertising its employment of CPAs, then the legislative scheme of Florida or any other State that precludes any professional's practice through general business corporations could be diluted.

A State must be able to limit the use of a state-granted title that communicates not only client reliance upon the licensee's competence but also third-party reliance on a licensee's objectivity and personal accountability. Further, a State has the right to limit the use of a state-granted title to only those business forms in which the licensee remains personally accountable to clients and the public. A State has also the right to protect its citizens by taking

---

33. *Sinnot v. Davenport*, 63 U.S. 227, 242, 22 How. 227, 16 L. Ed. 243 (1859).

34. *Gilman v. Philadelphia*, 70 U.S. 713, 732, 3 Wall 713, 18 L. Ed. 96 (1866).

35. 560 F.2d 285, 287 (7th Cir. 1977).

reasonable measures to preserve third-party reliance upon a "public" title. In particular, Florida should be able to restrict the license or refuse to issue or renew a certificate to one who, in their current form of practice, could not lawfully use the title. The use of the term "public" sets this title apart. Florida should be able to protect its citizens through requirements that persons trading upon this title when dealing with clients and trading upon third-party reliance should be equally accountable and not be able to hide behind a corporate facade.

CONCLUSION

For all of the reasons set forth herein and in the Petition for Writ of Certiorari, NASBA as *amicus curiae* respectfully urges the Supreme Court to grant the Petition.

Respectfully submitted,

NOEL L. ALLEN
Counsel of Record
ALLEN AND PINNIX, P.A.
Attorneys for Amicus Curiae
National Association of State
Boards of Accountancy
20 Market Plaza
Suite 200
P.O. Drawer 1270
Raleigh, North Carolina 27602
(919) 755-0505